UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE GUARD PUBLISHING COMPANY, d/b/a THE REGISTER-GUARD	)	
and	)	Cases 36-CA-8743-1 36-CA-8849-1
EUGENE NEWSPAPER GUILD, CWA LOCAL 37194	)	36-CA-8789-1 36-CA-8842-1

BRIEF OF *AMICUS CURIAE* THE COUNCIL ON LABOR LAW EQUALITY

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The Council on Labor Law Equality ("COLLE") appreciates the opportunity to be heard, on behalf of the business community it represents, regarding the important issue of employee use of e-mail in the workplace and an employer's ability to implement restrictions on non-business use of its e-mail system. This issue has a number of significant implications under the National Labor Relations Act, as the Board has identified in the questions set forth in the Notice of Oral Argument and Invitation to File Briefs. COLLE is submitting this brief in order to express its position on these questions.

The fundamental theme of COLLE's position is that an employer has the right to regulate use of its e-mail system, just as it has the right to regulate use of its other forms of communications equipment. E-mail should not be treated differently. In particular, e-mail should not be considered a virtual "workplace" for which the law regarding solicitation and distribution rules would apply. Nor should employers be required to cede access to their e-mail systems to unions who seek to communicate with employees working at home or other locations away from the employer's facility. Extant Board and Supreme Court law does not support these radical approaches to an issue the Board has already decided – an employer's right to regulate use of its communications equipment.

INTEREST OF THE AMICUS CURIAE

COLLE is a national association of employers formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation and interpretation of national labor policy on issues which affect a broad cross-section of industry.

STATEMENT OF THE CASE

This case raises a number of important issues regarding the application of an employer's e-mail policy. The administrative law judge in this case rejected the argument of the General Counsel and the Charging Party that an employer's e-mail system constitutes a "workplace" in which the Board's normal solicitation rules apply. JD(SF)-15-02, at 7. Instead, the administrative law judge held that e-mail is like other forms of communications equipment used in the workplace, for which the employer may lawfully ban all personal use during working or non-working time. Therefore, an e-mail policy that prohibits all personal or non-business use, regardless of whether such use occurs during non-working time, is facially lawful.

The administrative law judge found, however, that the employer in this case had not enforced its e-mail policy consistently and had permitted a variety of personal, non-business e-mail. Therefore, the judge held that the employer violated Section 8(a)(1) of the Act by discriminatorily enforcing its policy against e-mail dealing with union matters, and violated Section 8(a)(3) of the Act by disciplining an employee who used the e-mail system for union business. *Id.* at 8-9.

In addition, the administrative law judge held that the employer violated Section 8(a)(5) of the Act by insisting on a proposal to prohibit use of its e-mail system for union business. The judge found that this proposal was an illegal subject of bargaining, in light of the employer's failure to enforce its e-mail policy against other forms of non-business use. *Id.* at 10.

COLLE'S POSITION ON THE QUESTIONS PRESENTED

1. Do employees have a right to use their employer's e-mail system (or other computer-based communication systems) to communicate with other employees about union or other concerted, protected matters? If so, what restrictions, if any, may an employer place on those communications? If not, does an employer nevertheless violate the Act if it permits non-job-related e-mails but not those related to union or other concerted, protected matters?

COLLE agrees with the holding of the administrative law judge on this point, which was that "employees have no statutory right to use an employer's equipment or media" – including an employer's e-mail system. JD(SF)-15-02, at 7. Therefore, an employer may prohibit employees from using its e-mail system (and other communications equipment) for Section 7 purposes, as long as the prohibition is non-discriminatory. *Id.* This holding is squarely supported by the Board's decision in *Mid-Mountain Foods*, 332 NLRB 229 (2000), cited by the administrative law judge. The Board in *Mid-Mountain Foods* held that employees do not have a statutory right to use their employer's bulletin boards, telephones, public address systems, or video equipment to communicate about union matters:

> [T]here is no right to use an employer's bulletin board. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 NLRB 318 fn. 2 (1979), enfd. 649 F.2d 1213 (6th Cir. 1981) (per curiam). Nor is there a statutory right of an employee to use an employer's telephone for personal or nonbusiness purposes, such as union organizing matters. *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), enfd. in relevant part 714 F.2d 657, 663-664 (1983). Similarly, the Board has held that employees are not entitled to use an employer's public address system to communicate their union views. See, e.g., *The Heath Co.*, 196 NLRB 134 (1972). From these cases, it appears equally clear that the Union's employee supporters do not have a statutory right to show the video, especially since it has not been established that the Respondent permitted employees to show other videos.

Mid-Mountain Foods, 332 NLRB at 230.

E-mail should be treated like bulletin boards, telephones, public address systems, video equipment, and any other communication device provided by an employer for use in its business.

Since the administrative law judge's decision in this case, the Board has accepted this analogy. In *Richmond Times-Dispatch*, 346 NLRB No. 11 (2005), the Board adopted an administrative law judge's conclusion that the employer in that case violated Section 8(a)(1) of the Act by prohibiting employees who served as union representatives from using the company's e-mail system for union business, when the employer had allowed its e-mail system to be used for a wide variety of non-business purposes. *Id.*, slip op. at 3. In reaching this conclusion, the administrative law judge in *Richmond Times-Dispatch* drew an analogy between an e-mail system and bulletin boards and telephones. Noting that employees have no statutory right to use their employer's bulletin boards and telephones, the administrative law judge held that "[a]nalogously, Respondent could bar its computer equipment and e-mail system to any personal use by employees." *Id.*, slip op. at 7. But, because the employer in that case had permitted employees to send a wide variety of e-mails that had "little or any relevance to the Employer's business," the employer could not prohibit use of its e-mail system for union purposes. *Id.*

The administrative law judge in *Richmond Times-Dispatch* relied on an earlier administrative law judge decision in *Adtranz ABB Daimler-Benz*, 331 NLRB 291 (2000), which accepted the analogy between e-mail and bulletin boards and telephones. The administrative law judge in *Adtranz* held that the employer could prohibit any personal use of its e-mail system. *See id.* at 293. But, if personal use of the e-mail system was permitted, the employer could not discriminatorily restrict use of its e-mail system for union purposes. *Id.* The administrative law judge found no Section 8(a)(1) violation in *Adtranz* because there was no evidence that the employer had prohibited union discussions on its e-mail system. *Id.* No exceptions were filed to the administrative law judge's conclusion on this point. *See id.* at 291 n.1.

Thus, COLLE submits that extant Board law squarely supports the proposition that employees have no statutory right to use their employer's e-mail system for union and/or protected activity. An employer may regulate or prohibit use of its e-mail system for these purposes as long as it does not discriminate against union-related messages, as the Board held in *Richmond Times-Dispatch*. *See also E. I. DuPont & Co.*, 311 NLRB 893, 919 (1993). A showing of discrimination is crucial, however. Absent a showing of discrimination, employees do not have a right under the Act to use their employer's e-mail system to communicate about union or protected, concerted matters.

2. Should the Board apply traditional rules regarding solicitation and/or distribution to employees' use of their employer's e-mail system? If so, how should those rules be applied? If not, what standard should be applied?

COLLE agrees with the administrative law judge's rejection of the argument that an employer's e-mail and computer system constitutes a "work area" within the meaning of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Under this theory, the General Counsel and the Charging Party argued, the employer's e-mail policy was presumptively unlawful under *Republic Aviation* because it prohibited all non-business use of e-mail, including solicitation during non-working time.

While the argument that "cyberspace" is a "work area" may have some superficial and perhaps futuristic appeal, it is a false premise. "Cyberspace" is no more a work area than is a telephone system or a television or radio network. If a telephone system constituted a "work area" within the meaning of *Republic Aviation*, then a telephone company – or any other employer – could not prohibit its employees from using the company's telephone system for solicitation during non-working time. But that is not the law. *See Churchill's Supermarkets, Inc.*, 285 NLRB 138, 155 (1987), *enf'd*, 857 F.2d 1474 (6th Cir. 1988); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enf'd in relevant part*, 714 F.2d 657, 663-664 (1983). Similarly,

under the theory advanced by the General Counsel and the Charging Party, a television or radio station could not prohibit its employees from using the company's broadcast equipment for solicitation during non-working time. That too is not the law. *See Mid-Mountain Foods*, 332 NLRB at 230 ("there is no statutory right of an employee to use an employer's equipment or media").

Devices that send and receive e-mail, like telephones, televisions, or other communication devices, are simply that: employer-provided equipment for use in furtherance of the employer's business. The fact that employees use that equipment to perform their jobs does not give them the right to use the equipment to engage in union or personal solicitation, or for any purpose other than to enhance the employer's business. It is to be used for the employer's business purpose. The employer pays for it and supplies it to employees not for their personal use, but for use in their jobs for the benefit of the employer.

3. If employees have a right to use their employer's e-mail system, may an employer nevertheless prohibit e-mail access to its employees by non-employees? If employees have a right to use their employer's e-mail system, to what extent may an employer monitor that use to prevent unauthorized use?

COLLE's position is that an employer may lawfully prohibit non-employees from using its e-mail system, even if the employer permits employees to use its e-mail system for non-business or personal reasons. The considerations are quite different. Many employers, including some of COLLE's members, have e-mail policies that permit employees to engage in limited personal or non-business use of the company's e-mail system. This does not mean, nor should it mean, that these employers must open up their e-mail systems to non-employee representatives of outside organizations, whether it is a union or the Girl Scouts, the Salvation Army, or any other political, commercial, charitable, or religious organization. An employer must be permitted to restrict *its* e-mail system to use by *its* employees only.

COLLE's members take measures to block unsolicited e-mail from outside addresses (*i.e.*, "spam"), typically with some form of filtering software or service provider. Such "spam-blocking" countermeasures have become necessary in order to deal with the tremendous volume of spam that travels through the internet. A recent *New York Times* article reports that spam accounts for more than 9 out of 10 e-mail messages sent over the internet. Brad Stone, *Spam Doubles, Finding New Ways to Deliver Itself*, N.Y. Times, Dec. 6, 2006. Indeed, the spam filtering service provider for Morgan, Lewis & Bockius LLP—counsel to COLLE in this case—blocked more than 25 billion spam messages in December 2006 alone. This was a 144% increase over the prior December. Spam accounted for 94% of the e-mail received by this firm in December 2006.

The vast proliferation of spam through the internet and the potential harm it could cause a company in terms of computer viruses, lost productivity, and possible damage to the employer's computer system demonstrate that employers have legitimate business reasons for using spam-blocking measures. No violation of the Act should be prosecuted or found if an employer's spam-blockers filter out e-mail messages by non-employee union representatives, with the possible exception of a case in which the employer implemented the spam-blocking measures solely in response to a union organizing campaign. *Cf. Gallup, Inc.*, 334 NLRB 366 (2001) (holding that employer violated Section 8(a)(1) of the Act by promulgating a business-use only e-mail policy immediately after discovery of union organizing campaign), *enf'd*, 62 Fed.Appx. 557 (5th Cir. 2003).

Likewise, employers have legitimate business reasons for monitoring e-mail usage by employees. COLLE's members, like many other employers, have adopted e-mail policies that involve regular monitoring of their e-mail systems for messages that may be obscene, offensive,

harassing, or illegal. Employees are specifically warned that there is no expectation of privacy in using the company's e-mail system and that such monitoring will occur. Such e-mail monitoring policies should not constitute unlawful surveillance under the Act, again with the possible exception of a case in which the policy was implemented solely in response to Section 7 activity. *See Lechmere, Inc.*, 295 NLRB 92, 99-100 (1989) (employer's installation of surveillance cameras was lawful where the cameras served a legitimate business purpose), *enf'd on other grounds*, 914 F.2d 313 (1st Cir. 1990), *rev'd on other grounds*, 502 U.S. 527 (1992). *See also Mid-Mountain Foods*, 332 NLRB at 237 (dismissing Section 8(a)(1) allegation regarding installation of security cameras in warehouse where there was no evidence that employer installed cameras in response to union organizing campaign and where employer had legitimate business reasons for installing camera; "it would be unusual to find any commercial warehouse without a security system").

4. In answering the foregoing questions, of what relevance is the location of the employee's workplace? For example, should the Board take account of whether the employee works at home or at some location other than a facility maintained by the employer?

COLLE does not believe that the location of the employee's workplace should affect the Board's established law regarding an employer's right to limit personal or non-business use of its equipment or media. *See Mid-Mountain Foods*, 332 NLRB at 230. Employees who work from home or some other location away from their employer's facility have no statutory right to breach an otherwise lawful and valid business-use only e-mail policy. Nor should a union have the right to require an employer to reveal its employees' business e-mail addresses in order to communicate with employees in these locations.

Because the analogy between "cyberspace" and an employer's physical "workplace" is, as shown above, a false one, the *Lechmere* standard for permitting union access to an employer's physical property should *not* be applied to an e-mail system. *See Lechmere, Inc. v. NLRB*, 502

U.S. 527 (1992). Under the *Lechmere* standard, a union may be afforded a right of access to an employer's property if the union can demonstrate that "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id.* at 539 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956)). Logging camps, mining camps, and mountain resort hotels are classic examples of cases in which union access to an employer's physical property may be permitted under the *Lechmere* standard. *Id.* at 539-40. In these situations, physical access is needed in order to reach employees who, *"by virtue of their employment,* are isolated from the ordinary flow of information that characterizes our society." *Id.* at 540 (emphasis supplied).

The *Lechmere* standard does not apply to employees who work at home or some other location away from the employer's facility. As the Supreme Court made clear, the *Lechmere* standard applies *only* in situations where the employees both *live and work* in remote locations *controlled* by their employer – *e.g.,* logging camps or mining camps – and therefore cannot be reached except on the employer's property. *See Lechmere*, 502 U.S. at 539 (holding that the standard applies only where "the *location of a plant and the living quarters of the employees* place the employees *beyond the reach* of reasonable union efforts to communicate with them" (emphasis in original)). Employees who work from home do not, by definition, meet this standard. It can almost be assumed that employees who work from home have telephones and personal e-mail addresses, and thus are not persons who are "isolated from the ordinary flow of information that characterizes our society." *Id.* at 540. Enterprising unions using the internet can, in most cases, locate an employee's personal e-mail address, home address and/or home telephone number. Moreover, the union may physically visit the employee at home or at any other location where the employee may be working away from the employer's facility. The

Lechmere standard simply was not intended to apply to employees who can be reached at home, either in person or by electronic means.

5. Is employees' use of their employer's e-mail system a mandatory subject of bargaining? Assuming that employees have a Section 7 right to use their employer's e-mail system, to what extent is that right waivable by their bargaining representative?

An employer's e-mail policy, like employer policies governing bulletin boards, telephones, and other communications equipment, is a mandatory subject of bargaining particularly where violation of the policy could result in discipline or discharge. *See Success Village Apartments, Inc.*, 347 NLRB No. 100, slip op. at 8 n.28 (2006) (treating phone policy, fax policy, and copier policy as mandatory subjects of bargaining); *ATC/Vancom of California, L.P.*, 338 NLRB 1166, 1169 (2003) (holding that a bulletin board policy is a mandatory subject of bargaining); *Pepsi-Cola Bottling Co.*, 315 NLRB 882, 895 (1994) (treating policy regarding personal phone calls as a mandatory subject of bargaining).

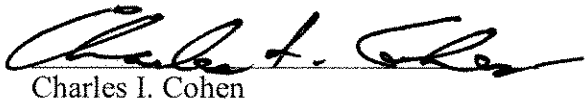
COLLE disagrees with the administrative law judge's conclusion in this case that an employer proposal to prohibit use of its e-mail system for union business, even in the face of a practice of permitting a wide variety of non-business use of the e-mail system, is an "unlawful codification of a discriminatory policy and constitutes an illegal subject of bargaining." JD(SF)-15-02 at 10. Even assuming that an employee's "right" to use the employer's e-mail system in this context is within the scope of the rights that a union cannot lawfully waive under *NLRB v. Magnavox*, 415 U.S. 322 (1974), the proposal at issue in this case appears to waive only the union's "right," as an institution, to use the employer's e-mail system, not an employee's right. A waiver of a union's institutional rights is not unlawful under *Magnavox*. *See Magnavox*, 195 NLRB 265, 266 n.9 (1972); *see also Yellow Cab, Inc.*, 210 NLRB 568, 569 (1974); *Samsonite Corp.*, 206 NLRB 343, 347 n.4 (1973).

6. How common are employer policies regulating the use of employer e-mail systems? What are the most common provisions of such policies? Have any such policies been agreed to in collective bargaining? If so, what are their most significant provisions and what, if any, problems have arisen under them?

Many of COLLE's members have established policies regarding use of the company e-mail system.[1] These policies typically permit some form of limited non-business or personal use. Indeed, one policy specifically provides it "allows occasional, incidental and infrequent reasonable non-business use of e-mail, just as you might use the phone." Thus, e-mail is, in fact, treated like other forms of communications equipment.

As noted previously, the e-mail policies established by COLLE's members typically warn employees that there is no expectation of privacy in using the company's e-mail system, and that the company monitors e-mail for inappropriate or illegal use. Employees are usually subject to discipline, up to and including discharge, for violating the e-mail policy. Some of these e-mail policies have been implemented without collective bargaining, whereas some have – at least to the extent that they call for discipline or discharge if the policy is violated. The policies typically are not part of the collective bargaining agreement; rather, they are free-standing policies similar to other work rules or policies that may be implemented pursuant to management's rights provisions in a collective bargaining agreement.

Respectfully submitted,



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1 A recent survey found that 64% of employers have established policies regarding the use of e-mail and/or instant messaging technology in the workplace, whereas 36% of employers have not. *See* Business Wire, "One in Three Companies Operate without Email Usage Policies, Risking Damage to Their Systems and Reputations, Sendmail Finds" (May 25, 2006).

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Dated: February 9, 2007

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

COLLE hereby requests the opportunity to participate in oral argument in this case, as set forth in the Notice of Oral Argument and Invitation to File Briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2007, a copy of the foregoing Brief of *Amicus Curiae* The Council on Labor Law Equality was sent by overnight delivery to the following:

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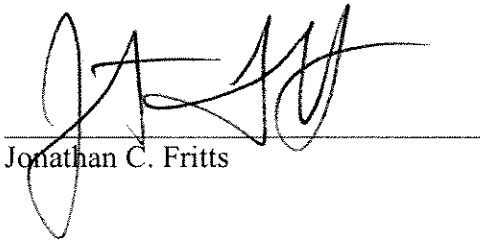

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